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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 174

O. HENRY TENT & AWNING COMPANY, a corporation,

Petitioner,

vs.

THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK, THE CONTINENTAL INSURANCE COMPANY, MILWAUKEE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, and UNITED STATES FIRE INSURANCE COMPANY,

Respondents.

PETITION OF O. HENRY TENT & AWNING COMPANY, A CORPORATION, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK, THE CONTINENTAL INSURANCE COMPANY, MILWAUKEE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, and UNITED STATES FIRE INSURANCE COMPANY,

Respondents.

PETITION OF O. HENRY TENT & AWNING COMPANY, A CORPORATION, FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, O. Henry Tent & Awning Company, a corporation, respectfully prays that a Writ of Certiorari issue to review the February 21, 1961 Opinion and Order of the United States Court of Appeals For the Seventh Circuit in the above-entitled cause.

OPINION BELOW.

The opinion and order of the United States Court of Appeals is set forth in Appendix A, at pages 1a to 10a, both inclusive. Such opinion is as yet unreported.

JURISDICTION.

The opinion and order of the United States Court of Appeals was entered on February 21, 1961. On April 5, 1961 the Court of Appeals denied petitioner's petition for rehearing. Jurisdiction of this Court is invoked under 28 U.S.C.A. (1).

QUESTIONS PRESENTED.

1. Whether the insurers (respondents) by their conduct during 1940 through 1956, the years they were severally exposed to the risk, and particularly during the policy year of 1955-1956, waived the condition of each of the policies requiring that reports of values be promptly filed within 30 days after the end of each month.

2. Did the insurers (respondents) sustain their heavy burden of showing that the District Court's finding of waiver was "clearly erroneous"?

3. Does the United States Court of Appeals by its opinion deprive the parties to the insurance contracts of their right to contract with each other whether expressly or by waiver?

4. Did the United States Court of Appeals by its opinion create a present and future estoppel of insurer and insured to waive conditions in policies of insurance inserted therein for their respective benefits.

Did the United States Court of Appeals by its Opinion impair the contract of insurance made between the parties, upon the insurers' acceptance of the insurance premium computed on a $32,188.29 inventory on hand in March of 1956 prior to the fire, where the companies accepted the March, 1956 reporting on April 27, 1956, a month after the fire.

STATEMENT OF THE CASE.

O. Henry Tent & Awning Company, a corporation, is engaged in the manufacture of circus and carnival tents, awnings and other canvas products, op rating a small plant for that purpose in Chicago, Illinois. From 1940 through March 31, 1956 it was insured under policies of insurance each containing a "Value Reporting Clause". The individual insurers exposed to the risk, wholly or in part, carried such risk during the years as follows:

The Continental Insurance Company from 1940 through 1956; Milwaukee Insurance Company of Milwaukee, Wisconsin and United States Fire Insurance Company from 1949 through 1956; and The Commonwealth Insurance Company of New York from 1953 through 1956.

Elmer A. Swanson of Albert Swanson & Son was the local general agent for the Milwaukee Insurance Company of Milwaukee, Wisconsin and the United States Fire Insurance Company for the entire 16 year period, 1940 through 1956, during which time O. Henry carried reporting form insurance; he signed all of the policies of fire insurance which were purchased by the insured from such companies, for whom he acted as agent. He signed all of the value reports submitted by the insured to the insurers, based on information received from O. Henry Tent & Awning Company. (See Agreed Statement of Facts App. 184-189) He brokered the insurance policies of The Commonwealtl Insurance Company of New York and The Continental Insurance Company and at their request furnished value reports to those companies by sending them to their local agent at the same time that he filed reports with his own companies.

On March 28, 1956 a fire occurred at 3222-24 North Halsted Street in Chicago, Illinois; personal property of the insured at that location was damaged and de-

stroyed; the last value report filed with the companies prior to the date of the fire was the report of value for the month of December, 1955; the reported value was $14,360.76. This report was filed on March 21, 1956, a week before the fire; on the date of the fire the January, 1956 report only was past due. It has been agreed that the fire loss sustained by the insured was $32,188.29. Even though the goods of the insured were destroyed in March, the petitioner filed the January, February and March reports on April 27, 1956 and in June of the same year paid to the respondents, and the respondents accepted a premium on the reported value of the March 1956 contents located in the insured's premises, even though the goods were no longer in being after the fire. The March 1956 report showed merchandise on hand of the value of $32,188.29 at the time of the fire.

Over all the years that the parties had been dealing each with the other, O. Henry Tent & Awning Company had tardily filed reports which were accepted without protest or comments by the insurers, and the insurers accepted and retained the computed premiums. We call this Court's attention to pages 194 through 198 of the Appendix (No. 13143) from which it appears that the insured continually and tardily filed its reports over the years; at no time did the companies advise the petitioner that it was in jeopardy of sustaining a loss in the event of fire on account of tardy filing, nor did the insurers warn the petitioner of the adverse consequences that might come into being if a loss occurred and a report was tardy and if the insured had more goods in its premises than that reported in the last previous report filed with the companies.

At no time did the insurers offer to pay the insured the sum of $14,360.76, nor did the insurers at any time

show a willingness to pay such sum, or did they ever tender such amount to the insured.

An action for declaratory judgment was brought by The Commonwealth Insurance Company of New York, The Continental Insurance Company, Milwaukee Insurance Company of Milwaukee, Wisconsin, and United States Fire Insurance Company against O. Henry Tent & Awning Company; by their Complaint they sought to have their collective liabilities under the policies limited to $14,360.76; O. Henry Tent & Awning Company filed its Counter-claim to recover from the insurers $32,188.29, the amount of its loss, and in addition thereto, interest pursuant to statute and attorney's fees for vexatious and unreasonable refusal to pay the amount of the loss.

After the Counter-Claim had been filed and for the first time, the insurers admitted that they owed the insured $14,360.76; the insured thereupon moved for partial summary judgment for that sum, which was entered and execution issued; on appeal to the United States Court of Appeals reported in 266 Fed. 2d 200, the judgment was reversed on the ground that in taking a partial summary judgment with execution to issue there was a fragmentation of a cause of action. In the meantime the insurers did not pay the sum admittedly owed by them to the insured nor did they deposit the money in the Registry of the Court but kept such funds in their own treasuries and presumably used them in carrying on their business.

While such appeal was pending the parties proceeded to trial on the balance of the remaining issues; the attorneys for the insurers sat on their hands and went through a trial that lasted on and off for 17 days; at no time did the insurance companies' attorneys advise

the Court that it had no jurisdiction to proceed inasmuch as a part of the cause was pending in the United States Court of Appeals, but after an adverse judgment had been entered against the insurance companies, then for the first time on appeal they claimed that the District Court had no jurisdiction to try the cause; the insurers' position was again sustained by the United States Circuit Court of Appeals, reported in 273 F. 2d 163. At that point this cause was sent back for trial, and this Court shall now have before it the Appendix, which reports the testimony verbatim and the evidence adduced in the last trial of this cause.

The insurers still refuse to pay to the petitioner the $14,360.76 admittedly due O. Henry and to the present time retain such moneys in their respective treasuries.

On May 4th 1961 the following order was entered by United States Court of Appeals. * * *

> On consideration of the motion of counsel for defendant-appellee to recall and stay the issuance of the mandate pending the filing of a petition for writ of certiorari in the Supreme Court of the United States, and the plaintiffs-appellants' suggestions to said motion,
>
> It Is Hereby Ordered that the said motion be granted, and the mandate of this Court heretofore issued to the United States District Court on April 13, 1961, be, and the same is hereby recalled and stayed for a period of thirty (30) days from this date in accordance with the provisions of Rule 28 of the Rules of this Court, subject to the tolling of interest as of April 17, 1961, in the event that the petition for writ of certiorari be denied or an adverse judgment otherwise rendered against O. Henry Tent & Awning Company.

REASONS FOR GRANTING THE WRIT.

The United States Court of Appeals for the Seventh Circuit in the case at bar has rendered a decision in conflict with the decisions of the United States Court of Appeals for the Second Circuit in *Schenley Distillers Corporation* v. *United States Fire Co.*, 90 F. 2d 633; the United States Court of Appeals for the Fourth Circuit in *Columbia Fire Insurance Co.* v. *Boykin & Taylor*, reported in 185 F. 2d 771, and the U.S. Court of Appeals in the Tenth Circuit in the cases of *American Eagle Fire Insurance Co.* v. *Burdine*, 200 F. 2d 26 and *Aetna Insurance Co.* v. *Rhodes*, 170 F. 2d 111, on the same matter.

This is a case of first impression in the United States Court of Appeals for the Seventh Circuit. The precise question as to whether the parties to this law suit, by their actions, waived the provisions of the reporting clause contained in the policies of insurance has never before been decided here. The purchasers of thousands and thousands of value reporting forms of policies issued in this heavily industrialized and mercantile area should, through an opinion of the Supreme Court of the United States, know if they are covered when insurers accept tardily filed reports and premiums computed thereon, or do they lose coverage for which they have paid if a loss intervenes, all without warning to the insured.

The Appellate Court, among other things, found that the reporting clause contained in the policies of insurance were conditions for the benefit of the insured. All conditions contained in policies of insurance come in one or more of three categories, and they are:

(1) conditions for the benefit of the insured;

(2) conditions for the benefit of the insurer;

(3) conditions for the benefit of both the insured and the insurer.

It therefore, follows that if the reporting clause was for the benefit of the insured, certainly the insured had a right to and did waive any condition in the policy placed therein for its benefit. If, on the other hand, the condition in the policy was for the benefit of the insurers, the insurers waived the benefit of that condition by their actions over the period of years in accepting tardily filed reports and using them in the computation of premiums due. The Court's conclusion in this case was that there could be no waiver of the reporting clause of the policies, and that the insured, having tardily filed its report, was bound by it and could recover only the reported value last filed prior to the fire. The Court states that the doctrine of waiver and estoppel cannot be invoked to increase coverage provided in an insurance policy and in support thereof cites only one Illinois case, that of *Spence* v. *Washington National Insurance Co.*, 320 Ill. App. 149, 50 N.E. 2d 128. That case did not in fact pass on whether a coverage provision could be waived in Illinois but turned on a point of pleading. On evidence heard, it was established that the plaintiff there had not been misled by any agent of the company, with authority to waive any provision in the policy. The exact wording in relation thereto is as follows:

> "There is no evidence which showed that McDaniel (the agent) was other than an ordinary soliciting agent. As pointed out above and as shown by many authorities of many courts, such an agent does not have the power to waive the provisions of a policy. *Pardon* v. *Wasvary*, 249 Ill. App. 327; *Rozgis* v. *Missouri State Life Ins. Co.*, 271 Ill. App. 155, 157; *Sommerio* v. *Prudential Ins. Co. of America*, 289 Ill. App. 520. We find no evidence showing that Willie

> Spence (the assured) was misled by any act of this insurance company, the defendant. (p. 156)

The alternative legal argument advanced by the insurance companies recognizes that waiver is very much in issue, but contends that the policy condition here involved is one affecting coverage and thus supposedly exempted from the well established principles of waiver. The short answer to this argument is, of course, that even assuming the condition to be one involving coverage, the Illinois courts have held that such a condition may be waived.

On the other hand the Illinois Courts have taken a liberal view toward allowing claims of waiver. Under the Illinois authorities it is the well established law that an insurance company may waive any conditions or provisions inserted in the policy for its benefit. *Western & Southern Life Ins. Co.* v. *Brueggeman*, 323 Ill. App. 173, 178 (1944); *Phenix Ins. Co.* v. *Grove*, 215 Ill. 299, 302 (1905); *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 192 (1902); *Beddow* v. *Hicks*, 303 Ill. App. 247, 255 (1940); and *Spiers* v. *Union Life Ins. Co.*, 345 Ill. App. 351, 359 (1952). The broad waiver rule adopted in Illinois has found specific application to the waiver of conditions in the policy requiring, as here, the insured's performance of some act within a given time period. Thus, the court in *Manufacturers & Merchants' Insurance Company* v. *Armstrong*, 145 Ill. 469 (1893), held the insurer had waived a condition in a fire insurance policy requiring the insured to install various fire prevention appliances within 60 days of its effective date. The court found waiver on the basis of evidence establishing that the assured informed the company's agent that it would be impossible to carry out the requirements within 60 days, to which the agent replied, "that they should go on and *do the best they could.*" (p. 474) In *Vandasant* v. *Fidelity-Phenix*

Fire Ins. Co., 249 Ill. App. 231 (1928), the court concluded that a fire insurer had waived a provision limiting its liability in the event any promissory note given for premiums was past due at the time of loss. Similarly, in *Spiers* v. *Union Life Ins. Co.*, 345 Ill. App. 351 (1952), a condition requiring timely payment of premiums was held to have been waived. The court approved an instruction reading "where an insurance company induces the insured . . . to believe that the payment of the policy premiums may be made after the due date, then the company waives their right to insist on prompt payment of the premiums on the due date." (p. 362)

Under the liberal rule adopted in Illinois that the insurer may waive "any" conditions or provisions inserted in the policy for its benefit, the courts have made no distinction between conditions going to coverage and those furnishing a ground for forfeiture. Among the many Illinois cases which have applied the waiver doctrine to a provision relating to coverage, are *Williamsburg City Insurance Co.* v. *Cary*, 83 Ill. 453 (1876) (waiver of provision in a fire insurance policy allowing coverage only while goods were located at a certain place); *Germania Life Ins. Co.* v. *Koehler*, 168 Ill. 293 (1897) (waiver of provision in a life insurance policy excluding coverage if the assured resided in the South during certain months of the year); *Eagleton* v. *Prudential Insurance Co. of America*, 193 Ill. App. 306 (1915) (waiver of a policy provision limiting coverage to return of the premiums paid, if the insured was not in good health at the time the policy was issued); *Mandelovitz* v. *New Amsterdam Casualty Co.*, 216 Ill. App. 404 (1920) (waiver of provisions in a burglary insurance policy allowing coverage only while goods were located at a certain place); *Western &*

Southern Life Ins. Co. v. *Brueggeman*, 323 Ill. App. 173 (1944) (waiver of a provision in a life insurance policy limiting the assured's coverage, in the event he died while in military service, to the amount of premiums paid plus interest); and, *Rodewald* v. *Randolph Mutual Insurance Co.*, 333 Ill. App. 271 (1948) (waiver of a provision in a fire policy excluding from its coverage any building unoccupied in excess of ten days).

The waiver of conditions or provisions in the policy may be by the company's agent as well as the company itself, *Reinhardt* v. *Security Insurance Co.*, 321 Ill. App. 324, 331 (1943), and "such waiver may be expressed or implied, which may arise from acts, words, conduct, notice or knowledge on the part of the insurer." *Western & Southern Life Ins. Co.* v. *Brueggeman*, 323 Ill. App. 173, 178 (1944) and *Beldon* v. *Hicks*, 303 Ill. App. 247, 255 (1940). As stated by the court in *Shaw* v. *Firemen's Ins. Co.*, 269 Ill. App. 83, 86 (1933), a waiver occurs, "If an agent induces the assured to believe that a strict compliance with the conditions of the policy would not be demanded, . . ." Furthermore, an oral waiver by an agent or a waiver resulting from his course of conduct may occur even though there is an express provision in the policy that any waiver must be by written endorsement attached to the policy, "[T]he stipulation in the policy that a waiver must be by an endorsement thereon was inserted for the benefit of the company, and, like any other condition of the policy for its benefit, might be waived by it." *Phenix Ins. Co.* v. *Grove*, 215 Ill. 299, 302 (1905); *Orient Ins. Co.* v. *McKnight*, 197 Ill. 190, 192 (1902).

Under the liberal approach toward waiver adopted by the Illinois courts, it is manifest that the insurance com-

panies, through their own statements and conduct and those of their agents, could, as the district court found they did, (App. 203) waive the policy condition now asserted as a limitation on O. Henry's recovery. This conclusion is inescapable even though the Illinois courts have not specifically considered waiver of the policy provision here in issue. Especially is this so since *every* court which has considered this particular condition has held that it can be waived. Directly in point is *Columbia Fire Ins. Co. v. Boykin & Taylor*, (4th Cir. 1950) 185 F.2d 771. There, as here, the insurance company covered the insured's stock of merchandise with a reporting form policy containing a value reporting clause requiring reports 30 days after the end of each month. The policy condition was identical with the one in O. Henry's policy. Just as in the present case, the required reports were made up and filed by the agent on the basis of information obtained by telephone or in person from the insured. Again as in this case, the agent failed to send them in within 30 days after the end of each month, and throughout the period there involved, there had been a history of considerable delinquency. All of the reports were accepted by the insurer without protest and the premiums were adjusted on the basis of them. While the insurance company occasionally sent out reminder post cards to the agent, it never complained to the insured. At the time of the loss the required reports were four months in arrears, and these delinquent reports were not actually filed until two weeks after the fire loss. On these facts, the court affirmed the District Court holding of waiver:

> The District Judge, in his opinion below, 90 F. Supp. 647, 649, stated: "Clearly the defendant is equitably estopped to plead, and has irrevocably waived, the reporting requirements of Clause 9 [the

value reporting clause of its policy. Its course of conduct from August, 1947 until the fire in March, 1949 demonstrates that it did not consider a report under Clause 9 as indispensable to fix the amount of the insurance protection in force for the property on hand."

With this we agree and we think, further, that the equities in this case are entirely on the side of the insured. (p. 773)

Also in point is *American Eagle Fire Ins. Co.* v. *Baldine*, (10th Cir. 1952) 200 F 2d 26. Again the case involved a policy containing a value reporting clause identical with the one in O. Henry's policy. The case was also one where the agent filled out the reports on the basis of information obtained from the insured over the telephone or through personal contacts. The agent sometimes allowed several monthly reports to accumulate before transmission, but the insurance company never registered a protest to the insured as to this procedure and habitually accepted the reports as a compliance with the terms of the policy. At the time of the loss on January 9, 1951, the last report on file was dated as of the preceding May 30, although it was shown that the agent obtained information for, but had not filed, a subsequent report as of September 1950. The court concluded that the insurance company, through the acts of its agent, had waived the timely filing of value reports:

> As we have seen, it is a condition of the policy that the insured shall report to the company not later than 30 days after the last day of each calendar month, the total value of the property to be covered by insurance, and failing to do that, the last report received by the company governs the amount of insurance. But it is a well recognized principle of

> equitable waiver and estoppel that if an insurance company through those who are authorized to speak for it, either by words or conduct, has induced an insured to refrain from doing that which he is obligated to do under the conditions of the policy, it will be deemed to have waived the requirements and may be estopped to deny the authority of its agent on whose conduct or representations the insured relied to his detriment. (p. 29)

Waiver of a value reporting clause similar, though not identical, to the one in O. Henry's policy was also found in *Aetna Ins. Co.* v. *Rhodes*, (10th Cir. 1948) 170 F.2d 111. Thus, not only do the broad principles of waiver established by the Illinois courts support O. Henry's claim here, but there is weighty authority from three Courts of Appeals specifically holding that the condition here in issue can be waived. O. Henry makes no contention that its recovery would not be limited by this condition, *were it not for the fact that the condition was waived.* This case is merely like hundreds of others decided by this and the Illinois courts which have held insurance companies bound to pay under the policy, because they waived a condition otherwise limiting their liability. The waiver cases referred to are but a few examples of such decisions.

In *Schenley Distillers Corporation* v. *United States Fire Ins. Co.*, 90 F. 2d 633 (2 Cir.) which involved the exact policy as that in the case at bar, the insurer, as a partial defense, claimed that the plaintiff could only recover an amount not to exceed the last reported value; in discussing the value reporting clause the Court, through Judge Learned Hand, stated that the plaintiff was extremely dilatory in making reports and that the insurer argued that if it was liable for anything at all, the limit of its liability was the value of its December report, being the last

filed immediately prior to its loss. The Court then continued (p. 635):

> "Moreover, if we did, and if the insured, so adjudged, had been dilatory, the insurer was bound to protest; for there was really an implied contract that he should, at least so long as the insured was acting in good faith. The law does not regard a man's actual intent, but only what a reasonable person, placed like him, would have intended. Here we are to assume that the insured, though actually delaying unreasonably, did not suppose that it was. The trouble to the insurer was very slight of protesting that the delay was imperiling its own interests; the consequence to the insured of not doing so was very grave, when the stocks were increasing. Most insurers would give such a warning; most insured would expect one; ordinarily both would understand that unless one was given the time to file ran on. Therefore, it did run on. * * * The partial defense is bad."

To the same effect was the case of *Hightower & Garth* v. *Home Insurance Co. of New York*, reported in 22 F. 2d 882. In that matter daily reports were required to be made. The reports were not made as required by the terms of the policy. The Court at page 885 stated:

> "On the question of waiver the Jury was charged that if, with knowledge on the part of defendant that daily reports were to be made, it elected to keep the policy in force and to collect the premium, that would amount to a waiver of that condition."

Any number of cases in other jurisdictions hold to the opposite of the matter in which the 7th Circuit found. Another case in point is that of *American Eagle Fire Insurance Co.* v. *Burdine*, 200 F. 2d 26, where the insurer, as in the case at bar, brought an action for declaratory judgment to determine its liability under a reporting

form of fire insurance policy, and the Court at page 29 stated:

> "As we have seen, it is a *condition* of the policy that the insured shall report to the company not later than 30 days after the last day of each calendar month, the total value of the property to be covered by insurance, and failing to do that, the last report received by the company governs the amount of insurance. But it is a well recognized principle of equitable waiver and estoppel that if an insurance company, through those who are authorized to speak for it, either by words or conduct, has induced an insured to refrain from doing that which he is obligated to do under the conditions of the policy, it will be deemed to have waived the requirements and may be estopped to deny the authority of its agent on whose conduct or representations the insured relied to his detriment."
>
> • • •
>
> "The appellate court agreed with the trial court that the insurer was equitably estopped to plead and irrevocably waived the monthly value report requirements of the policy, basing its decision squarely upon the company's approval of the agent's course of conduct in the dilatory preparation and submission of the reports."

CONCLUSION.

The decision of the United States Court of Appeals in this cause had led to great uncertainty in the rights of policy holders and of the insurance companies themselves. Decisions exactly in point rendered in other circuits are absolutely contrary to the decision made by the 7th Circuit Court of Appeals in this cause. We sincerely believe that this Court's allowing the prayer contained in this Petition for a Writ of Certiorari and for its re-examination of the questions posed by this case would be of great public interest.

Respectfully submitted.

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APPENDIX

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 13143 SEPTEMBER TERM, 1960—JANUARY SESSION, 1961

THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK, THE CONTINENTAL INSURANCE COMPANY, MILWAUKEE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, and UNITED STATES FIRE INSURANCE COMPANY,
Plaintiffs-Appellants,

v.

O. HENRY TENT & AWNING COMPANY, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 21, 1961

Before HASTINGS, *Chief Judge*; DUFFY, *Circuit Judge*; and GRUBB, *District Judge*.

GRUBB, *District Judge*. This is an appeal from a judgment entered in an action for declaratory judgment brought by plaintiffs-appellants to determine the extent of their liability under policies of fire insurance containing a monthly reporting form endorsement. O. Henry Tent & Awning Company (hereinafter referred to as the "Insured") counterclaimed in the suit for the amount of its actual loss. For previous appeals in this case see *Commonwealth Insurance Company of New York* v. *O. Henry Tent*

& Leasing Company, 266 F.2d 200 and 273 F.2d 163 (7th Cir. 1959).

On March 31, 1955, The Commonwealth Insurance Company, The Continental Insurance Company, Milwaukee Insurance Company, and United States Fire Insurance Company (hereinafter referred to as the "Insurers") each issued to the Insured an Illinois standard policy of fire insurance with Form No. 111 (Ed. June, 1953) "Multiple Location Reporting Form A, Monthly Average, With Premium Adjustment" attached thereto, for a period of one year, covering stock, materials, and supplies owned by the Insured while located at 3222-24 North Halsted Street, Chicago, Illinois. Total maximum liability in the sum of $50,000.00 was apportioned among the Insurers as follows:

Company	Percentage of Limit of Liability
The Commonwealth Insurance Company	15%
The Continental Insurance Company	15%
Milwaukee Insurance Company	35%
United States Fire Insurance Company	35%

These policies contain the following provisions:

> "Value Reporting Clause—It is a condition of this policy that the Insured shall report in writing to this Company not later than thirty (30) days after the last day of each calendar month, the exact location of all property covered hereunder, the total actual cash value of such property at each location and all specific insurance in force at each of such locations on the last day of each calendar month. *At the time of any loss, if the Insured has failed to file with this Company reports of values as above required*, this policy, subject otherwise to all its terms and conditions, *shall cover only at the locations and for not more than the amounts included in the last report of values* less the amount of specific insurance reported, if any, *filed*

prior to the loss, and further, if such delinquent report is the first report of values herein required to be filed, this policy shall cover only at the respective locations specifically named herein and for not exceeding 75% of the applicable limit of liability of this Company specified in the Limit of Liability Clause." (Emphasis supplied.)

"Premium Adjustment Clause—The premium named in this policy is provisional only. The actual premium considered for the liability assumed hereunder shall be determined, at the expiration of this policy, by application of the following formula:

"'A' After deducting the amount of specific insurance, if any (not exceeding, however, the amount of value reported), at each location, an average of the total remaining values reported at each location shall be made, and if the premium on such average values at the rate applying at each location herein provided or in the case of locations acquired (see Limit of Liability Clause), the rate used shall be the rate that is applicable to each such location at the time the location was first reported, exceeds the provisional premium, the Insured shall pay to the Insurer the additional premium for such excess; and, if such premium is less than the provisional premium, the Insurer shall refund to the Insured any excess paid."

The Insured has been insured from 1940 through March 31, 1956, under policies of insurance containing a "Value Reporting Clause." The individual Insurers have been carrying the risk, wholly or in part, beginning with the years stated: The Continental Insurance Company, 1940; Milwaukee Insurance Company and United States Fire Insurance Company, 1949; and The Commonwealth Insurance Company, 1953.

On March 28, 1956, a fire occurred at 3222-24 North Halsted Street wherein certain property insured under these policies of an actual value of $32,188.29 was damaged

and destroyed. The last report of value prior to the fire was for the month of December, 1955, and was filed on March 21, 1956. It reported a value on the contents located at the insured premises in the amount of $14,360.76. On April 27, 1956, the Insured filed reports of value with the Insurers for the months of January, February, and March, 1956, in the following amounts respectively: $16,726.76, $24,200.44, and $32,188.29. The premium computation in accordance with the Premium Adjustment Clause of the policies in question for the calendar year 1955-1956, resulting in a credit to the Insured, was based on an average value determined by inclusion of the declared March valuation.

At meetings held between the Insurers and the Insured after the fire, the Insurers expressed their willingness to pay to the Insured the amount of $14,360.76, the amount of value last reported prior to the fire, conditioned on a complete release as to further claims by the Insured. On or about February 15, 1957, the Insured filed with the Insurers sworn statements in proof of loss in the amount of $32,188.29, to be prorated among the Insurers according to their respective liability, and made claim for that amount.

Following the fire, the Underwriters Salvage Company of Chicago took custody of the salvageable property pursuant to an Agreement and Direction signed by the Insured's President, B. A. Mendelson. Net return of the proceeds of the salvage is being held in escrow by the salvage company pending determination of ownership and interest therein pursuant to the terms of the agreement.

Elmer A. Swanson of Albert Swanson & Son acted as the insurance broker for the Insured from and prior to 1940. Swanson was the local General Agent for Milwaukee Insurance Company and United States Fire Insurance Company from 1949 through 1956 and signed all policies of fire insurance purchased by the Insured from said companies. Swanson signed all Value Reports submitted by the Insured to the Insurers. The reports were based on information received from the Insured on inquiry by Swan-

son who filed the reports with H. Dalmar & Company of Chicago, Illinois, agent of The Commonwealth Insurance Company and The Continental Insurance Company, and directly with the Milwaukee Insurance Company and United States Fire Insurance Company, respectively.

Records produced on the trial reveal that monthly Value Reports required to be filed pursuant to the terms of prior policies, as well as under the policies in issue, frequently have been filed tardily.

After trial to the court, the district court found that the Insurers had waived the strict reporting requirements of the policies in issue and concluded that the Insured was entitled to recover the sum of $32,188.29 from the Insurers. The court further awarded the Insured interest on said sum from May 28, 1956, to the date of the Judgment Order together with costs, including reasonable attorney's fees in the amount of $500.00, because of the Insurers' unreasonable and vexatious delay in making payment of the Insured's fire loss. Judgment was entered accordingly.

The principal question on this appeal is whether under the law of Illinois the doctrine of waiver avails to excuse noncompliance with the Value Reporting Clause of a reporting from fire insurance policy

Value reporting clauses, similar to that involved here, have been the subject of judicial construction in other jurisdictions. The device of monthly reporting serves the purpose of affording complete insurance coverage on a fluctuating stock of merchandise and of determining a premium directly proportionate to the risk declared by the insured. This is a condition of benefit to the insured. *Peters* v. *Great American Ins. Co.*, 177 F.2d 773 (4th Cir. 1949); *Camilla Feed Mills, Inc.* v. *St. Paul Fire & Marine Ins. Co.*, 177 F.2d 746 (5th Cir. 1949); *Columbia Fire Ins. Co.* v. *Boykin & Tayloe, Inc.*, 185 F.2d 771 (4th Cir. 1950).

Under the clear and unambiguous terms of the Value Reporting Clause, the consequence of noncompliance with

the monthly reporting condition through tardy filing is a limitation on the coverage afforded in the amount of the last value reported prior to the loss. Noncompliance does not result in avoidance or cancellation of the policy. The condition is one going to coverage and not one of forfeiture of rights in respect to a defined risk. *Peters* v. *Great American Ins. Co., supra; Columbia Fire Ins. Co.* v. *Boykin & Tayloe, Inc., supra.*

Under Illinois law the doctrine of waiver or estoppel cannot be invoked to increase coverage provided under an insurance policy. *Spence* v. *Washington National Ins. Co.*, 320 Ill. App. 149, 50 N.E.2d 128 (1943). The numerous Illinois decisions cited by the Insured on the question of waiver of conditions of insurance policies are not controlling here because they are concerned with waiver or estoppel of conditions of benefit to the insurer and of forfeiture or avoidance of the policy.

Cases from other jurisdictions are not contrary to the conclusions that there can be no waiver of a condition of coverage under Illinois decisions. In the *Columbia Fire Ins. Co.* case, the court notes that waiver of a condition of coverage is proper under Virginia law. In *Aetna Ins. Co.* v. *Rhodes*, 170 F.2d 111 (10th Cir. 1948), arising in New Mexico, it was held that the insurer's failure to object to lack of filing of value reports resulted in waiver of *forfeiture* for which the insurer had contended. The court determined the loss with reference to a figure furnished as a provisional value by endorsement of the policy prior to the loss which was considered as the last report of value filed prior to the loss.

In *American Eagle Fire Ins. Co.* v. *Burdine*, 200 F.2d 26 (10th Cir. 1952), no reports of value were filed under the binder policy effective at the time of the loss. The court permitted an oral report as to value, submitted prior to the loss as information on the binder policy, to stand as the last report and held that the insurer had waived the monthly reporting condition.

While the *Aetna Ins. Co.* and *American Eagle Fire Ins. Co.* cases held that there was a waiver of the reporting condition, in both these decisions the measure of recovery is the amount of value declared by the insured in what the court decides constitutes the last report filed prior to the loss.

The case of *Schenley Distillers Corp.* v. *United States Fire Ins. Co.*, 90 F.2d 633 (2d Cir. 1937), involved a monthly reporting condition where the due date of the report was deliberately left blank. Although the insured was dilatory in filing the reports, the court concluded that the insurer had not proved that the delay was unreasonable and denied the partial defense that the insured was bound by its last filed report. The instant case must further be distinguished from cases allowing a waiver of the monthly reporting condition where the insured timely furnished the information to the insurer's agent and the delay in forwarding the report resulted solely from the conduct of said agent.

It is the conclusion of this court that there can be no waiver of the monthly reporting clause of the policies covering this loss and that the Insured, having filed its required reports tardily, is bound by the report of value last filed prior to the fire.

The Insurers protest the award of interest from a date sixty days after the loss, or May 28, 1956. The policies provide that the amount of loss for which the Insurers may be liable shall be payable sixty days after proof of loss is received. Under the circumstances of this case, the date on which the proof of loss was filed is not controlling with respect to the amount of liability admitted by the Insurers and contended for by them as the limit of their liability in this action. This amount was known to the Insurers at or about the time of the loss. The Insurers tendered this amount to the Insured on the condition of a complete release. Under these circumstances, an award of interest on the sum of $14,360.76 from May 28, 1956, is not unreasonable.

Our decision herein is in no way contrary to the recent decision of this court in No. 13102, *Quality Molding Company v. American National Fire Insurance Company, et al.*, ... F.2d ..... In that case, the plaintiff was the insured, and it was the plaintiff's conduct in rejecting a verdict in its favor that prevented the insurance companies from paying the amount ultimately found due.

We find that the Insurers' delay in payment of the amount of loss was not "vexatious and without reasonable cause" and that there is no justification for assessment of attorneys' fees as part of the taxable costs in this action.

The judgment appealed from is hereby reversed, and the case is remanded to the district court for proceedings consistent with this decision.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago 10, Illinois

Tuesday, February 21, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Kenneth P. Grubb, District Judge

The Commonwealth Insurance Company of New York, The Continental Insurance Company, Milwaukee Insurance Company of Milwaukee, Wisconsin, and United States Fire Insurance Company,

Plaintiffs-Appellants,

No. 13143 vs.

O. Henry Tent & Awning Company, a corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, and that this cause be, and it is hereby, Remanded to the said District Court for proceedings consistent with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, March 27, 1961

Before

Hon. John S. Hastings, Chief Judge

Hon. F. Ryan Duffy, Circuit Judge

Hon. Kenneth P. Grubb, District Judge

COMMONWEALTH INSURANCE COMPANY OF NEW YORK, et al.,
Plaintiffs-Appellants,

No. 13143 vs.

O. HENRY TENT & AWNING COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

SUPREME COURT, U.S. FILED
JUL 19 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 174

O. HENRY TENT & AWNING COMPANY,
A CORPORATION,
Petitioner,

vs.

THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK, THE CONTINENTAL INSURANCE COMPANY, MILWAUKEE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, AND UNITED STATES FIRE INSURANCE COMPANY,
Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 174

O. HENRY TENT & AWNING COMPANY,
A CORPORATION,

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vs.

THE COMMONWEALTH INSURANCE COMPANY OF NEW YORK, THE CONTINENTAL INSURANCE COMPANY, MILWAUKEE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, AND UNITED STATES FIRE INSURANCE COMPANY,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This answer to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit is respectfully submitted to this Honorable Court on behalf of The Commonwealth Insurance Company of New York, The Continental Insurance Company, Milwaukee Insurance Company of Milwaukee, Wisconsin, and United

States Fire Insurance Company, respondents herein, and is in opposition to the Petition for Writ of Certiorari herein sought to review a judgment of the United States Court of Appeals for the Seventh Circuit.

QUESTION PRESENTED.

Under the law of the State of Illinois, does the doctrine of waiver avail to excuse non-compliance with the Value Reporting Clause of a reporting form fire insurance policy?

STATEMENT OF THE CASE.

Respondents herein adopt as their statement of the case that portion of the opinion of the United States Court of Appeals for the Seventh Circuit rendered on February 21, 1961, written by District Judge Grubb and concurred in by Chief Judge Hastings and Circuit Judge Duffy, which relates the factual circumstances giving rise to this controversy. Said statement of the case is found in Appendix A to the Petition for Writ of Certiorari herein filed by petitioner and appears at pages 1a through 5a of said appendix. (For purposes of brevity, we do not repeat said statement here.)

Respondents are compelled to disregard the statement of the case found in the petition filed herein for the reasons that said statement is clearly recriminatory is at variance with the statement presented by the Court of Appeals for the Seventh Circuit and creates an erroneous impression of the question at issue in that it fails to bring to this Honorable Court's attention the value reporting clause of the policies of insurance upon which petitioner's claim is based, which clause is, of course, the touch-stone upon which any argument herein must be based.

Petitioner states at page 4 of its petition:

> "* * * at no time did the companies advise the petitioner that it was in jeopardy of sustaining a loss in

> the event of fire on account of tardy filing, nor did the insurers warn the petitioners of the adverse consequences that might come into being if a loss occurred and a report was tardy and if the insured had more goods in its premises than that reported in the last previous report filed with the companies."

We respectfully bring to the Court's attention, that, contrary to petitioner's statement, the policy of insurance herein provides *inter alia*:

> "Value Reporting Clause—It is a condition of this policy that the Insured shall report in writing to this Company not later than thirty (30) days after the last day of each calendar month, the exact location of all property covered hereunder, the total actual cash value of such property at each location and all specific insurance in force at each of such locations on the last day of each calendar month. *At the time of any loss, if the Insured has failed to file with this Company reports of values as above required, this policy* subject otherwise to all its terms and conditions, *shall cover only at the locations and for not more than the amounts included in the last report of values* less the amount of specific insurance reported, if any, *filed prior to the loss*. * * *." (Emphasis supplied.)

Clearly, petitioner was "advised" and "warned" of the consequences of its failure to report.

Respondents further respectfully bring to the Court's attention, contrary to petitioner's statement on page 6 of its petition, the fact that respondents attempted to satisfy the judgment herein and to that end presented in the trial court, a judgment order in accordance with the mandate of the Court of Appeals. No action on said order was taken, however, because of petitioner's representation that it would seek a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT.

Respondents respectfully submit that there is no good reason for this Court to grant the Writ of Certiorari herein sought. There is no federal question presented in this diversity matter. There is no novel question here relative to the supervision of the Courts of Appeals nor is there any conflict of decisions among the Courts of Appeals of the various circuits on any of the issues herein involved nor, for that matter, do the decisions of the various Courts of Appeals which have considered the question herein presented differ in result from the highest tribunals of the various states which have considered the nature and operation of the reporting form fire insurance policy. As there is no vital question presented in this case to which this Honorable Court should devote itself, respondents are compelled to oppose the granting of this writ.

At page 7 of its petition, petitioner states that the decision of the United States Court of Appeals for the Seventh Circuit is in conflict with the decisions of other Courts of Appeals. This is not the fact and, significantly, it should be noted that there is unanimity even though each Court of Appeals which has addressed itself to the question presented here has considered said question in the light of the law of the state from which the cause before it arose.

Simply stated, the question presented here is whether, under the law of Illinois, the doctrine of waiver avails to excuse non-compliance by an insured with a clause of its policy requiring it to report values prior to the attachment of coverage. Every case which has considered this question in relation to the reporting form fire insurance policy has held that the last report of value filed prior to loss is binding upon the insured and that the requirement for submission of a report cannot be waived. *Peters* v. *Great*

American Ins. Co., 177 F. 2d 773 (4th Cir.); *Carmilla Feed Mills* v. *St. Paul Fire & Marine Ins. Co.*, 177 F. 2d 746 (5th Cir); *Wallace* v. *World Fire & Marine Ins. Co.*, 70 F. Supp. 193, aff'd. 166 F. 2d 571 (9th Cir.); *Albert* v. *Home Fire & Marine Ins. Co.*, 275 Wis. 280, 81 N. W. 2d 549.

Columbia Fire Insurance Co. v. *Boykin & Taylor*, 185 F. 2d 771 (4th Cir.) and *American Eagle Fire Insurance Co.* v. *Burdine*, 200 F. 2d 26 (10th Cir.), cited by petitioner at pages 7, 12 and 13 are not contrary. In both of these cases there was a waiver not of the requirement that a report be submitted, but of the mechanics by which the report was to be submitted. In both cases reports were made by insureds to agents of the insurers and were accepted by said agents although the reports were not in the form desired by the insurers. The acceptance by the respective agents was held to be a waiver of a properly submitted written report. In the instant case, the form of the report was not in issue.

Likewise in *Aetna Insurance Co.* v. *Rhodes*, 170 F. 2d 111 (10th Cir.) cited by petitioner at pages 7 and 10, the court held that the value of merchandise fixed in the policy on the date of its issuance constituted a report in the event that no further reports were filed, thus preventing forfeiture of a policy. In the case at bar, the insurance policy specifically provides for the contingency which led to the *Rhodes* case.

The language of the Court of Appeals for the Fourth Circuit in *Columbia Fire Insurance Co.* v. *Boykin & Taylor*, 185 F. 2d 771 at page 776 is particularly apt here and should be dispositive of petitioner's claim. The Court therein stated:

> "Since the insured has the right, if it sees fit, to omit making a monthly report and thereby reduce its insurance, the insurer may well infer that the insured

> desires to limit its insurance to the amount shown by the insured's latest report, and consequently, there is no duty on the insurer to jog the memory of the insured."

Schenley Distillers Corporation v. *United States Fire Ins. Co.*, 90 F. 2d 633 (2nd Cir.), cited by petitioner at page 7 and 14 and *Hoffstatter and Guth* v. *Home Insurance Co. of New York*, 22 F. 2d 882 (5th Cir.), cited by petitioners at page 15 are inapposite here. Neither of these cases pertain to the reporting form fire insurance policy. This is made clear insofar as *Schenley* is concerned by the opinion of the Court below at page 7a of the appendix to the petition. *Hoffstatter* was not relied upon in the court below by petitioner prior to its petition for rehearing. That case involved a specially drafted "floater" policy and not the standard reporting form fire insurance policy.

The above cases on the reporting form fire insurance policy were all before the Court below. It is clear from the court's opinion that they were considered. In addition all of the cases from Illinois cited by petitioner at pages 9, 10 and 11 were cited to the Court below in its brief and were further brought to the Court's attention on oral argument. All of the cases from Illinois concerning waiver of conditions concerned waiver of conditions *subsequent* to the attachment of coverage. These cases are thus inapposite here where the condition in issue goes directly to the coverage afforded by the policy. It is the law of Illinois, and in fact of all other jurisdictions, that provisions of an insurance policy going to the attachment of coverage cannot be waived nor can a new policy creating different coverages be created by the doctrine of waiver and estoppel. *Peters* v. *Great American Ins. Co.*, 177 F. 2d 773 (4th Cir.) (considering the precise question herein involved); *Spence* v. *Washington National Ins. Co.*, 320 Ill. App. 149, 50 N. E. 2d 128 (stating the law of Illinois

and relied on by the Court below at page 6a; *Ehert v. Home Fire and Marine Ins. Co.*, 275 Wis. 280, 81 N. W. 2d 549 (considering the reporting form policy herein involved and decided by the court of last resort of the state of Wisconsin, a jurisdiction within the Seventh Circuit); Annotation, Waiver Or Estoppel In Respect of Scope Or Limitation of Coverage of Insurance Policy As Distinguished From Waiver Or Estoppel as Grounds of Forfeiture Or Defense, 113 A. L. R. 857, 858.

In the light of the foregoing, respondents respectfully submit that petitioners here seek nothing but a second review of this cause, which under the appropriate rule of law, must lead to affirmation of the decision of the Court below.

Respondents respectfully submit that the decision below creates no uncertainty and affects adversely no rule of law as applied to both insureds and insurers connected with the reporting form policy. Further review by this Court can serve no purpose but to place this Court's imprimatur on a matter of state law which has been consistently resolved in accordance with the position asserted by respondents here and adopted by the Court below.

CONCLUSION

For the foregoing reasons respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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